

## Testimony

**March 24, 2006, San Francisco, California**

Good afternoon. Thank you for inviting me here to provide information on national trends and programs on conservatorships.

Before I begin, I want to make a note of the terminology that I will be using. Every state has its own terminology. Common terms used are estate guardians, fiduciaries, and conservators, and there are several types within each category (such as public, private, and professional). As I discuss various state approaches, I will be using the terms used in those states. All of the information I provide can be used by the state of California to improve its conservatorship system in three areas: professionalization, monitoring, and accountability.

The series of articles in the Los Angeles Times shed light on the problem of some professional conservators engaging in less than ethical and sometimes, criminal behaviors. It also demonstrated challenges to the court in terms of oversight. I would like to say that the LA Times articles reflect a minor problem only in Los Angeles County, but the fact is, hundreds of communities across the country are experiencing similar problems. Nationally, there are very few stellar programs that adequately protect the safeguards of incapacitated persons assigned guardians or conservators.

To highlight the national and ongoing nature of the problem, I would like to share an Associated Press Report with you, on the broader topic of guardianships:

The Associated Press examined 2,200 randomly selected guardianship court files and found that half of the files were missing at least one annual accounting, and 13 percent of the files were empty, except for the opening of the guardianship. The report contended that “overworked and understaffed court systems frequently break down, abandoning those incapable of caring for themselves,” and that courts “routinely take the word of guardians and attorneys without independent checking or full hearings.” In short, it claimed that, sometimes, the courts responsible for overseeing guardianship cases “ignore their wards.”<sup>1</sup>

The date of this article? September 1987. As you undertake reforms in California, know that the problems you are addressing are not new. While there was a flurry of activity in the late 1980s, only recently have national groups and federal agencies begun re-examining issues impacting our growing aging population. While you know where you have been, and know that your problems are part of a national social problem, I’d like to focus the rest of my talk on where you might go.

In an ideal world, professional conservators will be qualified, trained, and certified or licensed. In an ideal world, the wishes of the conservatee will be honored and a collaborative

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<sup>1</sup> Cited in S. B. Hurme and E. Wood, “Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role,” *Stetson Law Review* 31 (2002), pp. 868-869.

multidisciplinary response will inform the courts. In an ideal world, case management systems will document compliance with rules. In an ideal world, judges and professional staff will have the resources, training, and initiative to monitor their conservatorship cases. In an ideal world, technology will be used to detect and document problems. In an ideal world, investigators and courts will prevent the theft and exploitation of the incapacitated. But then again, in an ideal world, there would be no need for conservators.

The question then is: How do we move from current reality to the ideal world?

Fortunately, there are a handful of projects and programs around the country that may be considered model programs, and that California could implement if it so chooses. While there are some exceptional court programs, such as the San Francisco Superior Court Probate Department, my focus here will be on statewide initiatives.

## Professionalization

The first issue that is gaining national attention is the concept of professionalizing the professional conservators. There are three menu options. The first of these is a registration system, which is used in California. In a registration system, conservators typically meet some qualification criteria and then apply to a state entity to be listed on the registry. The registry may include information on the experience of the conservator and complaints lodged against the conservator. The registry is used primarily as a resource. The second option is one of certification. In the certification process, conservators must typically qualify as a conservator, successfully complete training, and pass some sort of examination. The third option is licensing. In this scenario, conservators would be subject to a licensing board, with training requirements more extensive than that of a certification program.

Both certification and licensing have two primary advantages over a simple registration system. First, certification and licensing guarantee at least a minimal level of training and experience of conservators. Second, and perhaps most importantly, certification and licensing can be leveraged to increase compliance. After all, the **decertification** of a professional fiduciary essentially takes away the livelihood of the fiduciary.

In terms of national models, Arizona has by far the most comprehensive certification program for its public, non-profit, and private sector individual or business fiduciaries. I'll spend the next few minutes providing a snapshot of the Arizona Fiduciary Certification Program, which is administered by the Arizona Supreme Court.<sup>2</sup>

On the front end, the Arizona Fiduciary Certification Program requires applicants to meet basic qualifications<sup>3</sup> The applicant must then complete 18 hours of initial training and pass an

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<sup>2</sup> For more information, contact Nancy Swetnam, Certification and Licensing Division, Arizona Supreme Court, 602-364-0362, NSwetnam@courts.az.gov.

<sup>3</sup> The applicant must be at least age 21, a US citizen, possess a high school diploma or GED and 3 years of fiduciary experience, or possess a four-year college degree and one year of fiduciary experience.

examination administered by the program.<sup>4</sup> Once certified, fiduciaries must complete 20 hours of continuing education for renewal of the certification.<sup>5</sup>

But certification is only part of the story. The Program includes operational audits. Arizona audits every certified fiduciary. Staff will compare fiduciary records with court files and look for “red flags,” such as not filing annual reports or not filing inventories within the required 90 days.

The Program also includes a complaint process. Complaints come into the Fiduciary Certification office from a variety of sources—judges, court staff, adult protective services, attorneys, concerned friends and families. Staff are required to respond and pull files to investigate complaints, and provide a written case summary with violations noted.<sup>6</sup> When violations are found and fiduciaries are charged or suspended, the fiduciary has a right to a hearing.

Essentially, the Arizona Fiduciary Certification Program results in fiduciaries with at least some level of minimal training, and provides a monitoring and enforcement arm to ensure the quality of the program.<sup>7</sup>

## Judicial and Court Monitoring Programs

The second issue that must be addressed to develop a quality statewide conservator program is monitoring. At minimum, courts need a case management system to address probate cases. A number of courts have such a system or are moving toward a system. An example of a case management system has been in place in Rockingham County, New Hampshire, for several years. Their system automatically notifies court staff when reports are due for each guardianship case. If the court has not received a report, the system notifies court staff that an inventory default notice is needed. The system also tracks the number of new guardianship cases and total number of active cases.

But courts need to move beyond a case management system. The documentation of annual reports is no replacement for auditing. Excuse me while I slip back into the guardianship language. In Florida, state statute requires that the clerk of the court review each guardianship report. In Broward County, a three-tiered system is used. All reports are subject to the first level of review, conducted by the Audit Division of the Clerk of the Court’s office. Then a sample of reports are selected for a more intensive second level review. Finally, a further sample of reports is selected for detailed in-house and field audits of supporting documents to verify the

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<sup>4</sup> The training includes a session on successful business practices, minimum policies and procedures for fiduciary offices, and information on the role and responsibilities of fiduciaries.

<sup>5</sup> In 2004, there were 359 certified fiduciaries across the state.

<sup>6</sup> The summary is reviewed by a probable cause analyst to determine the next step. Options at this point include a letter of concern; the preparation of a charging document; or in more serious cases, emergency suspension and notification to judges.

<sup>7</sup> One of the most recent tools added to the Arizona arsenal is the Fiduciary Arrest Warrant. The warrant allows judges to have the fiduciary arrested, with information captured in the federal NCIC databank.

information in the reports. If these reviews indicate any irregularities, the Audit Division sends a memorandum to the judge to review the report and the auditor's findings.

Most models of exemplary monitoring systems are at the individual court level, rather than the state level. But this may soon change.

About three years ago, the Ramsey County Task Force (in St. Paul) was started in response to reports of abuse of the conservatorship program in Minnesota.<sup>8</sup> One of the innovations that Ramsey County is about to launch is a web-based application accessed through the Internet. When the system becomes fully operational, the Probate Office in each judicial district will have the ability to manage its database by setting up accounts, assigning passwords, and running audit reports. The conservator will be able to access this account from any place where there is internet access. On their personal computers, they will be able to use a software program<sup>9</sup> to manage their account and update the court's database. Conservators who do not have the software can use an entry form within the online conservatorship program that will also check the math.<sup>10</sup> Using this system, filings can be compared annually and can be checked against the initial filing. The data can be used to establish baselines and norms, which can be incorporated into programs that "flag" suspicious activities. Ramsey County is piloting this program in the near future, with the expectation that the program will be implemented statewide.

## Accountability

This leads into a discussion of my third and final topic: accountability. Judges and courts are ultimately responsible for managing, overseeing, monitoring, and enforcing conservatorship laws. But who is monitoring the courts? As we know, it is often the media that is the watchdog of society and highlights problems in our courthouses. I would like to offer alternatives.

First, it is extremely difficult to hold courts accountable when there is no systematic collection of data to indicate court performance in the probate area. The National Center for State Courts is currently leading the development of performance standards for the courts and recently presented ten core performance standards.<sup>11</sup> Courts are increasingly receptive and eager to document court performance through standardized measures.

Measures specific to conservatorships and guardianships are currently being developed by Dr. Max Rothman, of Florida International University, in coordination with the National Center for State Courts. Currently, very few courts are able to provide even simple data, such as the

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<sup>8</sup> For more information, contact Judge Margaret Marrinan, Ramsey County, Minnesota, 651-266-9180, Margaret.Marrinan@courts.state.mn.us.

<sup>9</sup> QuickBooks,

<sup>10</sup> The program contains some nice features. For instance, when Social Security increases, that increase will automatically be applied in the database. The conservator must still send in cancelled checks and receipts to document expenses.

<sup>11</sup> The standards covered issues such as due process, timeliness, and access to justice.

number of open conservatorship cases. The development of probate performance standards, however simplistic, is an excellent tool that can keep courts honest.

Second, accountability can be vastly improved when a strong centralized administrative office of the courts provides leadership, training, technical assistance, and mentorship to the courts. Allow me to share the experiences of the Michigan State Court Administrative Office (AOC).<sup>12</sup> Several years ago, the Michigan Office of Auditor General audited five probate courts and concluded that Michigan courts were not doing a good job overseeing conservatorships. One of the responses of the Michigan AOC was to develop a review model that was used in every probate court in the state to determine the level of compliance. The AOC hired two independent contractors to travel the state and conduct the reviews. Many courts were found to provide oversight beyond what was legally required, but a few courts were found to fall short. The courts were provided a letter outlining their areas of strengths and weaknesses and were then required to provide a corrective plan of action to the AOC.<sup>13</sup> All courts in the state are now providing, at a minimum, the legally required oversight to conservatorship cases. From this review, courts are more aware of their oversight role and are more aware of how to detect fraud. The AOC continues to conduct random reviews to ensure that the courts continue what was gained by the statewide review.

## Recommendations

Finally, I will offer five recommendations. But before I do so, I want to mention the opportunities that lie ahead and the unique position California is in to develop innovative solutions. California has one of the best probate courts in the nation in the San Francisco Superior Court and should take advantage of their expertise and experience. California has some of the most talented, innovative and dedicated judges in the nation. California's Administrative Office of the Courts is a centralized, professional, forward-thinking office that has the ability to implement statewide reform. Finally, California's technological expertise and widespread use of technology provides opportunities that do not exist elsewhere. California is geared to develop a system that has the best interests of incapacitated and elderly citizens at its heart.

My recommendations are:

1. Consider developing a certification or licensing program for conservators.
2. Implement a statewide case management system for probate courts that provides automatic notifications and tracks compliance.
3. Create a strategic plan that outlines how technology can be used to improve reporting, monitoring, and auditing of conservatorships.
4. Adopt statewide performance standards to be used in all probate courts.
5. Conduct periodic reviews of probate courts and provide training and technical assistance to ensure that all courts meet state standards.

Thank you very much for allowing me to present this information to you this afternoon.

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<sup>12</sup> For more information, contact Jean Mahjoory, Management Analyst, Michigan State Court Administrative Office, MahjooryJ@courts.mi.gov.

<sup>13</sup> Some of the courts required on-site help to prepare the corrective action plan.